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Supreme Court, U.S.
FILED
JAN 7 - 2004
OFFICE OF THE CLERK

No. 03-817

In the

Supreme Court of the United States

ROBERT TOCKES,

Petitioner,

v.

AIR-LAND TRANSPORT SERVICE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Seventh Circuit correctly apply *Sutton v. United Air Lines, Inc.*, and *Murphy v. United Parcel Service, Inc.*, in holding Petitioner failed to create a genuine issue of material fact as to whether his employer regarded him as disabled within the meaning of the Americans with Disabilities Act of 1990?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Air-Land Transport Service, Inc., states it has no parent company, nor does any publicly held company own ten percent (10%) or more of its stock.

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STATEMENT OF JURISDICTION

Robert Tockes invoked the jurisdiction of the district court under 28 U.S.C. § 1331 (2003). The court of appeals properly exercised jurisdiction over this matter pursuant to 28 U.S.C. § 1291 (2003). The judgment of the Seventh Circuit entered on September 9, 2003. Petitioner timely filed his Petition for Writ of Certiorari pursuant to Supreme Court Rule 13.1 and 28 U.S.C. § 2101(c) (1992). The Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2001).

STATUTORY PROVISION

42 U.S.C. § 12102(2)

The term "disability" means, with respect to an individual--

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

STATEMENT OF THE CASE

During discovery, Petitioner, Robert Tockes ("Tockes"), admitted he lacked any facts to suggest that Air-Land Transport Service, Inc. ("Air-Land"),

regarded him as having a physical or mental impairment that substantially limited a major life activity.

On January 2, 2001, Tockes applied for the position of local truck driver with Air-Land.[1] On his application, Tockes described continuous employment from 1991 through 2001, including five years as an Emergency Medical Technician ("EMT"). Tockes further reported he had logged 500,000 miles in the types of trucks he would be expected to drive (van, curtain, and flatbed). The application inquired if there were any reason Tockes would be unable to perform the functions of the driver job; Tockes answered: N/A. Contrary to his assertion in the Petition for Writ of Certiorari, Tockes' application does not contain any indication that he was disabled. (Pet. 2, 5; App. 6-7.)

Air-land offered Tockes a local driver position, conditioned on his ability to pass a drug test, as well as the mandatory Department of Transportation ("DOT") physical exam and road test. 49 C.F.R. §§ 391.11(b)(4) and (b)(8) (2003). Tockes passed the drug and road tests. On January 8, 2001, Tockes saw a physician for his DOT physical exam. Tockes advised the physician that he had not been extensively confined by illness or injury, nor did he suffer any permanent defect from illness, disease or injury. The examining physician certified Tockes capable of performing the functions of a driver pursuant to the relevant DOT regulations. (App. 7.)

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[1] Tockes incorrectly identifies Respondent as Air-Land Transport Services, Inc.

Air-Land hired Tockes, and on January 16, 2001, he began a week of classroom and hands-on training. The training provided extensive information on safe load-securement for flatbed trailers, including the proper use of a ratchet and winch-bar to fasten straps or chains. The proper method requires the driver to secure the ratchet to the trailer with a bungee cord and use two hands to operate the winch-bar. Tockes completed training, passed a written safety test, and began unsupervised driving on January 24, 2001. On January 31, 2001, less than ten days after he began driving for Air-Land, Tockes injured himself in the course of securing a flatbed load.

Air-Land investigated Tockes' accident and determined he had violated safety protocol in operating the ratchet and winch-bar. The investigators questioned the credibility and truthfulness of Tockes' statement that faulty equipment caused his accident. (App. 8-9.) Tockes conceded that he used one hand to operate the winch-bar. (App. 8.) Tockes suggests the parties dispute this fact. (Pet. 10 n.4.) This assertion misrepresents the evidence. The record contains nothing to contradict Tockes' own admission. (App. 8.) Additionally, Tockes' statement that he used "one hand on a two handed job" mischaracterizes the facts. (Pet. 5.) Tockes used both hands—one to stabilize the ratchet and one to operate the winch-bar. Tockes conceded that using only one hand to operate the winch bar was a safety violation. (App. 8.) The 1988 injury to Tockes' right hand neither caused nor contributed to his accident on January 31, 2001.

Tockes knew his failure to abide by safety procedures could result in termination of his

employment. (App. 8.) Air-Land's Vice President of Operations, Tom Daman, acted as the decision-maker regarding Tockes' employment. Daman chose discharge as the appropriate remedy for Tockes' failure to follow safety protocol and his attempt to conceal his actions by reporting that faulty equipment caused the accident.

On February 12, 2001, Air-Land advised Tockes of its decision to terminate his employment. Air-Land employees Darren Merrell and Mike Minton were present during the meeting. Tockes testified that during this meeting, Merrell said "[o]ur first mistake was hiring somebody who's handicapped." Tockes then testified, "I remember that after he said 'handicapped' . . . I just kind of zoned out. I mean, I was in shock. I mean, it was kind of like you could just hear every other word he was saying." Tockes stated that Merrell also used the words "disabled" and "crippled" during this meeting, though he has no specific recollection of the context. Merrell and Minton deny that such remarks were made, but for purposes of summary judgment, Air-Land, the district court, and the Seventh Circuit accepted Tockes' recollection as true.

In his Petition, Tockes states that a non-disabled employee committed multiple safety violations before being terminated. This assertion misrepresents the facts. Air-Land employee, Roger Boatman, received a warning when Air-Land learned he had failed to properly equip his truck with a ladder before an over-the-road assignment. When Air-Land learned Boatman failed to pick up a ladder after being advised to do so, it terminated his employment.

Tockes filed his complaint in the United States District Court for the Central District of Illinois. The only disability Tockes identified was the injury he sustained while serving in the military in 1988. The district court entered summary judgment in favor of Air-Land, finding Tockes failed to present evidence from which a reasonable juror could conclude: he was actually disabled, Air-Land possessed a record of disability, or Air-Land regarded him as disabled.

Tockes only appealed his "regarded as" claim. The Seventh Circuit affirmed, and in an opinion authored by Judge Posner, held, "[w]hat defeats Tockes' suit is that there is no evidence that his employer harbored the erroneous belief that he was disabled *within the meaning of the Act.*" (App. 2-3.)

Air-Land rephrased the question presented to more clearly articulate the issues submitted to and ruled upon by the Seventh Circuit. Tockes builds his first question on the erroneous legal conclusion that "direct evidence" of discrimination existed in this case, an argument the Seventh Circuit rejected on the specific record evidence. Additionally, Tockes' first question is argumentative because it mischaracterizes the evidence presented. Tockes' second question requests an impermissible advisory opinion from the Court. To the extent the second question fairly includes matters related to the facts or legal issues presented by this case, the Court's previous decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), answered them.

REASONS FOR DENYING THE WRIT

A. The Seventh Circuit Correctly Articulated the Controlling Law and Properly Rejected Tockes' Claim he was Regarded As Disabled.

The Americans with Disabilities Act of 1990 ("ADA") provides, in relevant part, "[t]he term 'disability' means, with respect to an individual— (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; . . . or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The ADA does not define "substantially limits," but the Court has spoken directly to the meaning of the phrase in no fewer than four cases in the last four years. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002)(holding that the term means "prevents or severely restricts"); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 564-65 (1999)(finding that the term "significant restriction" appropriately reflects the statute's intent); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999)(applying the "considerable" or "to a large degree" definition in a regarded as case); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 523 (1999)(holding that to the extent working constitutes a major life activity, a plaintiff must be regarded as "precluded from" more than one job).

Major life activities include those which "are of central importance to most people's daily lives." *Toyota Motor*, 534 U.S. at 198. Such activities include caring for oneself, walking, seeing, hearing, and speaking. 29 C.F.R. § 1630.2(i) (2003).

In *Sutton*, the Court clearly defined the standard for plaintiffs seeking to avail themselves of the "regarded as" prong of the disability definition. The Court articulated two ways in which an individual could establish membership in the protected class, "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton*, 527 U.S. at 489. The Court further clarified the scope of the "regarded as" definition, noting an employer "is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job." *Sutton*, 527 U.S. at 490-91.

Similarly, in *Murphy*, the Court held that Murphy's discharge did not violate the ADA, even though the employer admitted terminating his employment because of a physical impairment, hypertension. *Murphy*, 527 U.S. at 523-24. The Court required Murphy to present evidence regarding both the major life activity that was the subject of his employer's mistaken belief (he chose working) and the nature of the substantial limitation wrongly perceived by the employer. *Id.* The Court rejected Murphy's efforts, holding he failed to submit evidence his employer regarded him as "'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs . . . .'" *Murphy*, 527 U.S. at 523 (quoting 29 C.F.R. § 1630(j)(3)(i)). Hence, to survive summary judgment, a plaintiff must identify the major life activity subject to the employer's misperception and must present some evidence regarding the mistakenly

perceived limitations harbored by the employer. *Id.* at 523-24; *Sutton*, 527 U.S. at 490-91.

The Seventh Circuit properly articulated the rule of law announced in *Sutton* and *Murphy*, stating, "[u]nless the employer mistakenly believes that an employee has a disability grave enough to be so classified under the ADA, the employer's acting on the mistaken belief does not violate the statute." (App. 3.) The court held that Tockes failed to present any evidence that Air-Land regarded him as "disabled *within the meaning of the Act.*" (App. 2-3.) Tockes essentially asks the Court to grant his Petition for Writ on the basis that the Seventh Circuit misapplied the proper standard to the record evidence. In fact, the Seventh Circuit properly applied the law to the facts.

Before the Seventh Circuit, Tockes failed to identify either the major life activity or the limitations his impairment imposed on that activity, which were the subject of Air-Land's purportedly mistaken beliefs. Instead, Tockes argued Air-Land viewed him as "being deprived of the use of a limb," a definitional phrase borrowed from a dictionary. He concluded, "[t]he loss of use of a limb can lead to substantial limitations in a number of major life activities, including, grasping, pushing, pulling, climbing, lifting, writing, etc." Notably, Tockes never identified any support for the assertion that these generic tasks satisfy the definition of major life activity. Nor did he present evidence (beyond the conclusory dictionary citation) that Air-Land considered him prevented or severely restricted in his ability to grasp, push, pull, climb, lift or write.

Tockes correctly states that the inquiry turns on Air-Land's belief at the time it terminated his employment. Tockes failed to present any evidence that during the course of his training or employment Air-Land gained any information from which it could form a belief, even a mistaken one, that the injury to his hand substantially limited his performance of a major life activity. Rather, all of the information Air-Land possessed (DOT medical certification, passing the road test, significant prior experience as a truck driver, successful completion of safety training, two weeks working for Air-Land, and nearly five years as an EMT) indicated Tockes had functional use of both hands.[2]

Tockes' reliance on *Laws v. Pact Inc.*, 2000 WL 777926 (N.D. Ill. Apr. 19, 2000), does not further his request for a writ of certiorari. In *Laws*, the district court entered summary judgment against the plaintiff because she failed to present any evidence her employer mistakenly believed that her diagnosis of Huntington's Disease substantially limited any activity central to her daily life. *Laws*, 2000 WL 777926 at *3. The district court in *Laws*, like the lower courts in the present case, ruled the plaintiff's failure to present evidence that her employer wrongly believed her substantially limited in performing a major life activity defeated her claim. Tockes' evidentiary failure does not warrant the Court's attention.

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[2] Tockes cites *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568 (7th Cir. 2002), as support for his argument that being deprived of the use of a limb is necessarily a substantial limitation on a major life activity. That case is inapposite because the employer admitted that Hoffman was a qualified individual with a disability. *Hoffman*, 256 F.3d at 573.

If the Seventh Circuit accepted Tockes' argument, the ruling would permit a plaintiff to survive summary judgment based solely on an employer's use of the words disabled, crippled, or handicapped. Hence, individuals with no actual disability, and no evidence their employer held a mistaken belief about significant limitations to a major life activity, would be afforded protection equal to that provided to the truly disabled. Such a result would be absurd.

Similarly, Tockes' request that the Court apply a Title VII standard to the ADA reveals his fundamental misapprehension of the ADA's definition of disability.[3] In large part, immutable characteristics define the classes protected by Title VII. A plaintiff's race, color, sex, and national origin are not subjected to the fact intensive inquiry necessary to determine membership in the class of persons the ADA safeguards. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)(noting that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.").[4] Religion is the only protected

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[3] Tockes cites *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), in support of this argument. In *Siefken*, the court affirmed dismissal on a Rule 12(b)(6) motion without discussing whether the employee was actually disabled or regarded as disabled. The ruling turned on the employee's inability to control his diabetes while driving a patrol car, thus endangering himself and the public. Hence, *Siefken* offers no support for Tockes' Petition.

[4] Likewise, although age is not immutable, its determination need not entail detailed factual analysis. *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000)("Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.")

characteristic that requires factual inquiry, and its protection arises merely from a sincere and meaningfully held belief. *Welsh v. United States*, 398 U.S. 333, 339-40 (1970)(citation omitted).

Conversely, the mere fact that individuals suffer from identical physical impairments does not compel a finding that both individuals suffer from a disability as defined by the Act.[5] Instead, the particularized inquiry demanded by the ADA serves to insure that only those persons profoundly impacted by their limitations, or the mistaken perceptions of their employers, may avail themselves of the ADA's protections. *Toyota Motor*, 534 U.S. at 197-99; *Murphy*, 527 U.S. at 522-23. The Seventh Circuit properly rejected Tockes' suggestion that the ADA affords him protection, absent any evidence that Air-Land harbored some mistaken belief that the injury to his hand substantially limited a major life activity.

The Seventh Circuit properly decided the case below by applying the statutory terms of the ADA,

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[5] *Compare Fraser v. Goodale*, 342 F.3d 1032, 1041-42 (9th Cir. 2003)(holding that diabetes was a disability), *with Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724-25 (8th Cir. 2002)(finding that plaintiff's evidence was insufficient to demonstrate diabetes was a disability); *compare Otting v. J.C. Penney Co.*, 223 F.3d 704, 710-11 (8th Cir. 2000)(finding that epilepsy was a disability), *with Brunke v. Goodyear Tire & Rubber Co.*, 344 F.3d 819, 821-22 (8th Cir. 2003)(holding that plaintiff failed to adduce sufficient evidence to demonstrate epilepsy was a disability); *compare Criado v. IBM Corp.*, 145 F.3d 437, 442-43 (1st Cir. 1998)(finding that attention deficit disorder was a disability), *with Blackston v. Warner-Lambert Co.*, 2000 WL 122109, *4 (N.D. Ala.)(holding that the evidence was insufficient to establish attention deficit disorder as a disability), *aff'd*, 228 F.3d 418 (11th Cir. 2000)(table).

further clarified by the Court's rulings. Tockes fails to establish any tension between the ADA and the appellate court's decision. Hence, his Petition should be denied.

B. No Conflict Exists Between the Seventh Circuit's Ruling and the Decisions of the Other Courts of Appeal.

The Seventh Circuit's articulation of the rule of law announced in *Sutton* and *Murphy* is consistent with every other court of appeals to have considered the issue. The appellate courts uniformly require plaintiffs to identify what major life activity formed the basis of the employer's mistaken belief and present some evidence regarding the extent of the misperceived limitation.[6] Similarly, the courts of appeal are in accord when applying the rule.[7] Hence, the Seventh Circuit's

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[6] *Schuler v. SuperValu, Inc.*, 336 F.3d 702 (8th Cir. 2003); *EEOC v. J.B. Hunt Transp., Inc.*, 321 F.3d 69 (2nd Cir. 2003); *Mack v. Great Dane Trailers*, 308 F.3d 776 (7th Cir. 2002); *EEOC v. United Parcel Service, Inc.*, 306 F.3d 794 (9th Cir. 2002); *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162 (1st Cir. 2002); *Rakity v. Dillon Co.*, 302 F.3d 1152 (10th Cir. 2002); *Mahon v. Crowell*, 295 F.3d 585 (6th Cir. 2002)(applying *Sutton* to the Rehabilitation Act); *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462 (4th Cir.), *cert. denied*, 537 U.S. 827 (2002); *Mason v. United Air Lines, Inc.*, 274 F.3d 314 (5th Cir. 2001); *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506 (3rd Cir. 2001); *Gordon v. E.L. Hamm & Assoc.*, 100 F.3d 907 (11th Cir. 1996).

[7] *See, e.g., Shaver v. Indep. Stave Co.*, 350 F.3d 716 (8th Cir. 2003)(holding that evidence showing employees called plaintiff "stupid" and said he was "not playing with a full deck" because of his epilepsy and resulting operation allowed reasonable inference that plaintiff was regarded substantially limited in major life activity of thinking); *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d

articulation and application of controlling law stands in harmony with its sister circuits.

Tockes ignores this significant body of case law, and relies instead on two wholly inapposite cases. In *Equal Employment Opportunity Commission v. Exel, Inc.*, 208 F.Supp.2d 1013 (E.D. Mo. 2002), the employee suffered several back injuries. His physician imposed limitations on repetitive bending, twisting, and heavy lifting, which precluded the employee from performing the essential functions of his job. The district court

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1117 (10th Cir. 2003)(holding that employee survived summary judgment on "regarded as" claim where she presented evidence that her supervisors believed her mental impairment rendered her incapable of working in a broad class of jobs); *Dyke v. O'Neal Steel, Inc.*, 327 F.3d 628 (7th Cir. 2003)(holding that evidence the employer's personnel assistant said that plaintiff "looked odd," failed to inquire as to the specific limitations imposed by monocular vision, and failed to administer a vision test, would allow a reasonable juror to conclude the employer regarded plaintiff as substantially limited in his ability to see); *Johnson v. Paradise Valley Sch. Dist.*, 251 F.3d 1222 (9th Cir. 2001)(holding that evidence the employer was aware of serious injury to plaintiff's leg, refused to consider plaintiff for thirteen separate positions, and refused to accept a return to work slip with less than full recovery, allowed reasonable inference that employer regarded plaintiff as substantially limited in major life activity of working); *McInnis v. Alamo Community College Dist.*, 207 F.3d 276 (5th Cir. 2000)(holding that employee with physical manifestations of impairment, including slurred speech, survived summary judgment because the employer's ADA compliance coordinator testified that she "could tell from his file that he was either disabled or perceived as disabled" by employer); *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180 (3rd Cir. 1999)(holding that evidence showed employer mistakenly interpreted a physician's report in concluding employee was substantially limited in performing broad range of jobs that would require standing, walking or "moving about").

entered summary judgment in favor of the employer because the plaintiff failed to present any evidence his employer regarded him as disabled within the meaning of the ADA. Specifically, the district court found the evidence demonstrated the employer regarded the employee as unable to perform the job of warehouse operator, which did not translate into a mistaken perception that the employee's back problems substantially limited his ability to work.

Likewise, the facts and holding in *Mustafa v. Clark County School District*, 157 F.3d 1169 (9th Cir. 1998), are inapposite. In *Mustafa*, the court only addressed a claim of actual disability, not a regarded as claim. The court's analysis focused on whether the record evidence allowed the inference that plaintiff's depression, post-traumatic stress disorder, and panic attacks substantially limited him in the major life activity of working. The court found the plaintiff produced sufficient evidence to survive summary judgment.

The *Mustafa* court then turned to the ultimate issue, whether the school district terminated the plaintiff solely because of his disability. If the employer acknowledges that the disability impacted its employment decision (direct evidence), then it must demonstrate the disability was not improperly considered because it "is relevant to the job requirements." *Mustafa*, 157 F.3d at 1175-76 (citations omitted). On the other hand, if the employer denies that the disability affected its decision, the *McDonnell Douglas* framework applies. *Id.* The *Mustafa* court applied the burden-shifting framework because the plaintiff failed to present direct evidence. Likewise, the

direct evidence analytical framework is not available to Tockes, as the best inference he can draw from Merrell's statement is that Merrell regarded him as impaired—*not* substantially limited in a major life activity.

The Seventh Circuit properly required Tockes to produce some evidence that Air-Land entertained a misperception about Tockes—either that he had a substantially limiting impairment that he did not, or that he had an impairment Air-Land wrongly perceived as substantially limiting. In the absence of any facts to support his claim, and in light of Tockes' admissions that he lacked any facts to establish these necessary elements of a regarded as claim, the court of appeals properly affirmed the entry of summary judgment in favor of Air-Land. Tockes fails to establish that the Seventh Circuit's opinion conflicts, in any manner, with the rulings of the other courts of appeal.

C. The Issues Tockes Presents are not Sufficiently Compelling to Warrant Review by the Court.

The particular facts of this case—Tockes does not suffer from a physical or mental impairment that substantially limits a major life activity, and failed to produce any evidence Air-Land mistakenly regarded him as so limited—drove the Seventh Circuit's opinion. Tockes disregards this straightforward application of law to facts, and attempts to manipulate the holding into an academic direct evidence question.[8]

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[8] Tockes did not ask the Seventh Circuit to apply its direct proof/circumstantial evidence framework. *See, e.g., Gorence v.*

The Court's prior decisions speak clearly to the nature of direct and indirect proof in discrimination cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148 (2003). The Court further provided general and specific examples of direct evidence in the context of discrimination cases. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)(holding that written policy prohibiting employees over the age of sixty from transfer was direct evidence of age discrimination); *United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983)(noting that direct evidence of discriminatory intent provides "'eyewitness' testimony as to the employer's mental process."). No further guidance is required.

Tockes' efforts to characterize this case as sufficiently important for review should fail because he inaccurately identifies the nature of the evidence he presented. While Tockes acknowledges that direct evidence requires no inference (Pet. 6), his Petition reveals his absolute dependence on inference (Pet. 3-4, 7-8, 9). The heart of his argument rests on the necessary inference that use of the word "crippled" means Air-Land wrongly perceived Tockes as "deprived of the use of a limb," and further that Air-Land regarded such purported deprivation as a substantial limitation of one or more major life activities. No such evidence exists to support this conclusion—it requires heaping inference upon

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Eagle Food Ctr, Inc., 242 F.3d 759, 762 (7th Cir. 2001). Hence, he waived any such argument.

inference. *United States v. Ross*, 92 U.S. 281, 283-84 (1875)("No inference of fact or law is reliable drawn from premises which are uncertain.").

Stereotypes must arise from some information upon which an employer can base a conclusion, mistaken or not. *See School Bd. of Nassau County v. Arline*, 480 U.S. 271, 284 n.12 (1987)(noting that the employer's knowledge of Arline's tuberculosis and its decision to terminate her employment because of it evidenced archaic fears of contagious disease). Tockes' failure to identify *any* information upon which Air-Land could have formed the conclusion that he was "deprived of the use of a limb" or substantially limited in a major life activity doomed his case below. His failure should not be afforded further review.

CONCLUSION

The only question presented in this case turns on the Seventh Circuit's proper application of the law, articulated in *Sutton* and *Murphy*, to the specific facts of this case. Tockes' request for an impermissible advisory opinion should fail. Given the uniform application of the controlling law by the courts of appeal, certiorari is unnecessary to resolve any conflict among them. Finally, the questions presented in the Petition are not sufficiently important to warrant the Court's exercise of review. Hence, Air-Land respectfully requests the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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